

To: Caminiti, Mariagrazia[mariagrace.caminiti@sol.doi.gov]
From: Romanik, Peg
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CRS Memo re Timber Harvesting in Katahdin (2).pdf

MG- This is what I sent to Downey re: Katahdin Monument (Maine). I have also attached a report she sent me which is a Congressional Review Service report on the same topic as my memo. Peg

Peg Romanik
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From: Romanik, Peg <peg.romanik@sol.doi.gov>
Date: Thu, Jul 20, 2017 at 6:52 PM
Subject: monuments
To: Downey Magallanes <downey_magallanes@ios.doi.gov>

Downey, attached is our memo. Thank you very much for your patience. I was surprised at the intensity and quantity of incoming in this new position.

I spoke with Aaron this morning, he is still researching some issues related to your question about (b)(5) DPP (b)(5) ACP. I hope to get back to you much sooner than I did on this matter. Again, I apologize for the delay. Peg

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MEMORANDUM

July 19, 2017

To: Representative Bruce L. Poliquin
Attention: Kate Renz, Legislative Counsel

From: Alexandra M. Wyatt, Legislative Attorney, 7-0816, awyatt@crs.loc.gov

Subject: **Timber Harvesting in Katahdin Woods and Waters National Monument**

In response to your request, this memorandum reviews the current legal framework governing the authority of the President or the Secretary of the Interior (Secretary) to authorize commercial timber harvesting on land previously designated as a national monument pursuant to the President's authority under the Antiquities Act. Specifically, the memorandum addresses the laws governing commercial timber harvesting in the Katahdin Woods and Waters National Monument.¹ The President's authority to modify a national monument proclamation to allow such timber harvesting is untested, but past presidents have diminished the size of national monuments or made other management changes to national monuments under certain circumstances. The Secretary's authority to allow for timber harvesting on national monument land appears limited by the framework applicable to the National Park Service (NPS), which manages the Katahdin Woods and Waters National Monument pursuant to the Proclamation.

Amendment of Monument Proclamation

The Antiquities Act² is a delegation of Congress's authority over federal lands pursuant to the Property Clause of the U.S. Constitution.³ It provides:

The President may, in the President's discretion, declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments. . . . The limits of the parcels [reserved as national monuments] shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.⁴

The overriding management goal for all monuments is protection of the objects described in the proclamations.⁵ In support of this goal, limitations or prohibitions on certain land uses may be included in

¹ Congress could authorize commercial timber harvesting on any federal land or take various other legislative actions with respect to the National Monument. U.S. CONST. art. IV, § 3 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . ."). See also NPS ARCHAEOLOGY PROGRAM, *Monuments List*, <https://www.nps.gov/archaeology/sites/antiquities/MonumentsList.htm> (2016) (listing monument expansions, diminishments, transfers, and abolishments by Congress).

² 54 U.S.C. § 320301 (previously codified at 16 U.S.C. § 431, recodified by Pub. L. No. 113 287, § 3, 128 Stat. 3259 (2014)).

³ U.S. CONST. art. IV, § 3.

⁴ 54 U.S.C. § 320301(a) (b).

⁵ 54 U.S.C. § 320301(b).

the proclamations themselves, accompanying Administration statements, management plans developed by the agencies to govern monument lands, agency policies, or other sources.⁶ Limitations or prohibitions vary based on the nature of the monument, the managing agency, and other factors; for example, timber harvesting may not necessarily be prohibited on national monuments under the jurisdiction of the Forest Service.⁷

In the Proclamation establishing the Katahdin Woods and Waters National Monument, President Obama reserved approximately 87,500 acres of federally owned or controlled land for the purpose of protecting the various objects identified in the lengthy description preceding the reservation.⁸ The Proclamation withdrew lands “from all forms of entry, location, selection, sale, or other disposition under the public land laws, from location, entry, and patent under the mining laws, and from disposition under all laws relating to mineral and geothermal leasing,”⁹ subject to “valid existing rights.”¹⁰ While the Proclamation does not expressly forbid timber harvesting, it does appear to limit timber harvesting through its designation of the monument’s managing agency. The Proclamation requires the Secretary of the Interior to manage these lands “through the National Park Service, pursuant to applicable authorities and consistent with the valid existing rights and the purposes and provisions of this proclamation.”¹¹ As explained below, the current authorities governing the National Park Service generally do not contemplate commercial timber harvesting on monuments managed by the agency. Pursuant to the Antiquities Act, the Proclamation has the immediate force of law.¹² Thus, to change the protected objects, scope of withdrawal, or management agency of the monument to allow timber harvesting, the President may need to revoke or modify (to the extent he is authorized to do so) the Proclamation or certain passages within it.

As discussed in CRS Report R44687, *Antiquities Act: Scope of Authority for Modification of National Monuments*, by Alexandra M. Wyatt, to date, no president has attempted to revoke or terminate a national monument proclamation, so there has been no definitive judicial interpretation on whether such authority exists.¹³ The Antiquities Act itself refers expressly only to the President’s unilateral power to declare national monuments by public proclamation and does not reference any power to revoke a previous proclamation.¹⁴ Some have argued that the Antiquities Act does not implicitly delegate any revocation power, and that it operates as a one-way ratchet reversible only by Congress.¹⁵ They point to, among other

⁶ For more information on national monuments and the Antiquities Act, see CRS Report R41330, *National Monuments and the Antiquities Act*, by Carol Hardy Vincent.

⁷ See, e.g., *Angoon v. Hodel*, 803 F.2d 1016, 1024 (9th Cir. 1986) (citing Forest Service statutory authority at 16 U.S.C. § 472a(a) and noting that timber harvesting is not per se prohibited in National Monuments).

⁸ Proclamation No. 9476, 81 Fed. Reg. 59,121–27 (Aug. 29, 2016).

⁹ “[E]ntry, location, selection, sale, or other disposition under the public land laws” does not encompass timber harvesting, which does not entail “disposition” of land under the public land laws. See *Se. Conference v. Vilsack*, 684 F. Supp. 2d 135, 143 (D.D.C. 2010) (“a withdrawal exempts covered land from the operation of laws that otherwise authorize the transfer of federal lands to the private domain for private use.”).

¹⁰ Proclamation No. 9476, 81 Fed. Reg. at 59,126–27. While CRS is unaware of any existing rights that may allow for the commercial harvesting of timber on Katahdin Woods and Waters National Monument lands, the discussion of any such rights is beyond the scope of this memorandum.

¹¹ *Id.* at 59,126.

¹² See, e.g., *Utah Ass’n of Ctys v. Bush*, 316 F Supp 2d 1172, 1183–84 (D. Utah 2004), *appeal dismissed on jurisdictional grounds* by 455 F3d 1094 (10th Cir. 2006) (affirming creation of Grand Staircase Monument).

¹³ See, e.g., Larry Ausherman, *Trumping the National Monument Designations of Past Presidents*, AM. COLLEGE OF ENVTL. LAWYERS (May 23, 2017), <http://www.acoel.org/post/2017/05/23/Trumping-the-National-Monument-Designations-of-Past-Presidents.aspx> (discussing potential issues that could be raised regarding efforts to abolish or materially alter national monuments).

¹⁴ 54 U.S.C. § 320301.

¹⁵ See generally, e.g., ROBERT ROSENBAUM ET AL., THE PRESIDENT HAS NO POWER UNILATERALLY TO ABOLISH OR MATERIALLY CHANGE A NATIONAL MONUMENT DESIGNATION UNDER THE ANTIQUITIES ACT OF 1906 (2017), *available at* (continued...)

arguments, a 1938 Attorney General opinion maintaining that the president lacks authority under the Antiquities Act or otherwise to revoke a national monument proclamation;¹⁶ asserted congressional acquiescence to that interpretation as evidenced by Sections 204(j) of the Federal Land Policy and Management Act of 1976 (FLPMA), which expressly bars the Secretary of the Interior from modifying or revoking any withdrawals that created national monuments pursuant to the Antiquities Act;¹⁷ and the lack of an express authority to revoke or modify withdrawals despite such language being included in other statutes.¹⁸ Others have argued that the President does have implied authority to revoke national monuments, emphasizing the President's general powers under Article II of the U.S. Constitution and deemphasizing the specific language of the Antiquities Act's delegation of authority under the Property Clause.¹⁹ Opposing sides of this argument also differ over other issues such as how to interpret the Antiquities Act's legislative history, its purpose, and its relatively scant body of judicial decisions.²⁰

Similar debate has occurred regarding the existence or extent of presidential authority to reduce materially the size or otherwise materially alter management of a national monument.²¹ Presidents have diminished national monuments in size, although not in recent years. For example, the former Mount Olympus National Monument in Washington was diminished in acreage three times after its establishment—including once in 1915 by nearly half²²—before it was ultimately redesignated by Congress as a national park in 1938.²³ In 1933, President Franklin Roosevelt transferred management of a number of national monuments to NPS as part of a broader reorganization of executive agencies.²⁴ No subsequent inter-agency transfers were accomplished by presidential action.²⁵

Regardless of the yet-undetermined scope of any presidential authority to revoke or modify national monuments, in the specific case of the Katahdin Woods and Waters National Monument, the deeds granting the lands to the federal government do not independently impose restrictions on the

(...continued)

<https://www.npca.org/resources/3197> legal analysis of presidential ability to revoke national monuments; Mark S. Squillace et al., *Presidents Lack the Authority to Abolish or Diminish National Monuments*, 103 VA. L. REV. 55 (2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2967807; Nicholas Bryner, *National Monuments Under Trump*, LEGALPLANET (Apr. 10, 2017), <http://legal.planet.org/2017/04/10/national-monuments-under-trump/>.

¹⁶ 39 Op. Att'y Gen. 185 (1938).

¹⁷ Pub. L. No. 94 579, § 204(j), 90 Stat. 2743, 2751 (1976) (codified at 43 U.S.C. § 1714(j)). Some also point to Title VII of FLPMA, which repeals other presidential withdrawal authorities but preserves the Antiquities Act. Pub. L. No. 94 579, tit. VII, 90 Stat. 2743, 2786 94 (1976).

¹⁸ See, e.g., *id.*; Forest Service Organic Act of 1897, 16 U.S.C. § 473 *et seq.*

¹⁹ See generally JOHN YOO AND TODD GAZIANO, AM. ENTERPRISE INST., PRESIDENTIAL AUTHORITY TO REVOKE OR REDUCE NATIONAL MONUMENT DESIGNATIONS (2017), available at <https://www.aei.org/wp-content/uploads/2017/03/Presidential-Authority-to-Revoke-or-Reduce-National-Monument-Designations.pdf>.

²⁰ See *Cappaert v. United States*, 426 U.S. 128, 141 42 (1976) (affirming federal government's reservation of appurtenant water rights in establishing Devil's Hole as part of Death Valley National Monument); *Cameron v. United States*, 252 U.S. 450, 455 56 (1920) (upholding establishment of large national monument at Grand Canyon); *Mt. States Legal Found. v. Bush*, 306 F.3d 1132, 1135 (D.C. Cir. 2002) (summarizing case law, upholding dismissal of complaint challenging six national monument proclamations by President Clinton as unconstitutional and beyond the authority of the Antiquities Act). Compare YOO AND GAZIANO, *supra* note 19, with, e.g., ROSENBAUM ET AL., *supra* note 15.

²¹ See, e.g., Squillace et al., *supra* note 15; YOO AND GAZIANO, *supra* note 19.

²² Proclamation No. 1293, 39 Stat. 1726 (May 11, 1915). The acreage removed from the Mount Olympus National Monument in 1915 was returned to the management of the U.S. Forest Service.

²³ See NPS Archaeology Program, *supra* note 1.

²⁴ NPS, AMERICA'S NATIONAL PARK SYSTEM: THE CRITICAL DOCUMENTS, ch. 3, available at https://www.nps.gov/parkhistory/online-books/anps/anps_3b.htm (excerpting Executive Orders Nos. 6166, 6228).

²⁵ NPS Archaeology Program, *supra* note 1.

government's ability to use the land for non-monument purposes or transfer it to another agency.²⁶ Nor do the deeds expressly reserve any rights of the grantor or others to allow or engage in commercial timber harvesting. While deed restrictions can impose obligations on the federal government,²⁷ the deeds at issue for the Katahdin Woods and Waters National Monument lands do not contain relevant restrictions.²⁸

Authority of the Secretary of the Interior

Setting aside questions regarding the existence or scope of presidential authority to abolish, modify, or transfer national monuments, any such authority cannot be delegated to other executive branch officials. FLPMA repealed a number of other withdrawal and reservation authorities, but, as noted above, left the Antiquities Act in place.²⁹ FLPMA expressly prohibits the Secretary of the Interior from modifying or revoking any withdrawal that creates a national monument under the Antiquities Act.³⁰

The Secretary of the Interior, through NPS, does have authority to *adapt* the management of national monuments—which are units of the National Park System³¹—but this authority is constrained by statute, as well. Most broadly, NPS must “promote and regulate the use of the National Park System by means and measures that conform to the fundamental purpose of the System units, which purpose is to conserve the scenery, natural and historic objects, and wild life in the System units and to provide for the enjoyment of the scenery, natural and historic objects, and wild life in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.”³² Congress furthermore has directed NPS not to authorize activities or otherwise administer the System “in derogation of the values and purposes for which the System units have been established”³³

More specifically, under statute, NPS “may provide for the destruction of such animals and plant life as may be detrimental to the use of any System unit.”³⁴ Nonetheless, no express statutory authorization is provided for timber harvesting in National Park System units, including national monuments.³⁵ The subsequent section of NPS's statutory provisions provides that “[t]he Secretary, on terms and conditions to be fixed by the Secretary, may sell or dispose of timber in cases where, in the judgment of the Secretary, the cutting of timber is required to control attacks of insects or diseases or otherwise conserve

²⁶ Deeds and deed exhibits from the Penobscot County Registry of Deeds, on file with author.

²⁷ See, e.g., *United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973) (noting that deed restrictions on federal lands generally are enforceable); see also U.S. Department of Justice, Environment and Natural Resources Division, Land Acquisition Section Regulations of the Attorney General Governing the Review and Approval of Title for Federal Land Acquisitions 2, 26–28 (2016), available at <https://www.justice.gov/enrd/page/file/922431/download> (summarizing legal effects of deed restrictions).

²⁸ Deeds and deed exhibits from the Penobscot County Registry of Deeds, on file with author.

²⁹ Pub. L. No. 94–579, tit. VII, 90 Stat. 2743, 2786–94 (1976).

³⁰ FLPMA § 204(j), 43 U.S.C. § 1714(j) (“The Secretary shall not . . . modify or revoke any withdrawal creating national monuments under [the Antiquities Act] . . .”).

³¹ For more information on the kinds of units within the National Park System, see CRS Report R41816, *National Park System: What Do the Different Park Titles Signify?*, by Laura B. Comay.

³² 54 U.S.C. § 100101(a).

³³ *Id.* § 100101(b)(2); *S. Utah Wilderness All. v. Nat'l Park Serv.*, 387 F. Supp. 2d 1178, 1191 (D. Utah 2005) (applying this language to uphold NPS interpretation of statutory authorities underlying prohibition of motor vehicles in a National Park).

³⁴ *Id.* § 100752 (formerly 16 U.S.C. § 3).

³⁵ This is in contrast to other types of federally managed lands, for which the statutory authorities may expressly authorize timber harvesting. E.g., 16 U.S.C. § 482h–2 (National Forests); 43 U.S.C. § 2601 (Oregon and California Railroad and Coos Bay Wagon Road Grant Lands managed by the Bureau of Land Management).

the scenery or the natural or historic objects in any System unit.”³⁶ As suggested by these provisions, NPS does not have a significant history of timber management on lands under its jurisdiction.³⁷

NPS has interpreted these and other statutory provisions in its regulations. NPS’s regulations apply *inter alia* “to all persons entering, using, visiting, or otherwise within: . . . [t]he boundaries of federally owned lands and waters administered by the National Park Service,”³⁸ including the Katahdin Woods and Waters National Monument. The regulatory provisions most directly pertaining to timber provide as follows:

- (a) Except as otherwise provided in this chapter, the following is prohibited:
 - (1) Possessing, destroying, injuring, defacing, removing, digging, or disturbing from its natural state:
 - . . . (ii) Plants or the parts or products thereof. . .
 - (4) Using or possessing wood gathered from within the park area: Provided, however, That the superintendent may designate areas where dead wood on the ground may be collected for use as fuel for campfires within the park area.
- . . .
- (c)
 - (1) The superintendent may designate certain fruits, berries, nuts, or unoccupied seashells which may be gathered by hand for personal use or consumption upon a written determination that the gathering or consumption will not adversely affect park wildlife, the reproductive potential of a plant species, or otherwise adversely affect park resources.
 - . . .
 - (3) The following are prohibited:
 - (i) Gathering or possessing undesignated natural products.
 - (ii) Gathering or possessing natural products in violation of the size or quantity limits designated by the superintendent.
 - (iii) Unauthorized removal of natural products from the park area.
 - (iv) Gathering natural products outside of designated areas.
 - (v) Sale or commercial use of natural products.³⁹

A park superintendent may authorize traditional gathering and removal of plants or plant parts by federally recognized Indian tribes, subject to various conditions.⁴⁰

NPS policies provide additional detail on NPS’s management of tree-related resources.⁴¹ They state:

Consumptive uses of park resources may be allowed only when they are

- specifically authorized by federal law or treaty rights (such as hunting, trapping, or mining, or subsistence use in specifically identified parks);
- specifically authorized pursuant to other existing rights (such as a right retained by a donor of the land on which the use would occur);
- grazing activities authorized in accordance with section 8.6.8.1; or
- traditional visitor activities, such as fishing or berry picking, that are authorized in accordance with NPS general regulations.⁴²

³⁶ *Id.* § 100753 (formerly 16 U.S.C. § 3).

³⁷ See generally NPS, MANAGEMENT POLICIES 2006: THE GUIDE TO MANAGING THE NAT’L PARK SYSTEM § 1.4 (2006), available at <https://www.nps.gov/policy/mp/policies.html>.

³⁸ 36 C.F.R. § 1.2(a).

³⁹ *Id.* § 2.1.

⁴⁰ *Id.* § 2.6.

⁴¹ NPS, MANAGEMENT POLICIES 2006: THE GUIDE TO MANAGING THE NATIONAL PARK SYSTEM (2006), available at <https://www.nps.gov/policy/mp/policies.html>.

In addition, NPS policies regarding “collecting natural products” state:

The gathering of firewood will be allowed only where subsistence use is authorized by federal law, or in specific areas designated by a superintendent in which dead and down wood may be collected for campfires or in small quantities for other uses within the park. Natural resource products that accumulate as a result of site clearing for development, hazard tree removal, vista clearing, or other management actions will be recycled through the ecosystem when practicable. When recycling is not practicable, the products may be disposed of by other means. Disposal may be accomplished by contract, if the result of the work done under contract and the value are calculated in the contract cost, or by sale at fair market value in accordance with applicable laws and regulations. Wood that accumulates as a result of the management actions described above may also be used for park purposes, such as heating public buildings or offices or for interpretive campfire programs.⁴³

While these statutes, regulations, and policies would appear generally to prohibit timber harvesting in units of the National Park System, NPS has used more limited silvicultural practices to manage certain forest stands where it determined that doing so would promote ecological health, particularly in the context of recovery of second-growth stands that had been logged prior to park establishment.⁴⁴

(...continued)

⁴² *Id.* § 8.9.

⁴³ *Id.* § 8.8.

⁴⁴ See, e.g., NPS, REDWOOD NATIONAL & STATE PARKS, PARK SEEKS INPUT ON FOREST MANAGEMENT PLAN (June 9, 2014), https://www.nps.gov/redw/learn/news/upload/2014_06_09_RNSP_Second_Growth_Management_Plan_comments.pdf.

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To: Downey Magallanes
Deputy Chief of Staff

From: Peg Romanik
Associate Solicitor
Division of Parks and Wildlife

Re: Katahdin Woods & Waters National Monument Forest Management

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